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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881. No. 180.

CHATFIELD & WOODS, THE POWERS PAPER COMPANY, SNIDER & HOOLE, H. B. GRAHAM & CO., and S. A. TOWER & CO.

Appellants.

against

W. F. BOYLE, JEFFERSON DAVIS, *et al.*

Appellees.

Appeal from Circuit Court for the Western District of Tennessee.

BRIEF FOR APPELLANTS.

W. M. RAMSEY, Solicitor.

Supreme Court of the United States.

CHATFIELD & WOODS, THE POWERS PAPER COMPANY, SNIDER & HOOLE, H. B. GRAHAM & CO., and S. A. TOWER & CO.

Appellants.

against

W. F. BOYLE, JEFFERSON DAVIS, *et al.*

Appellees.

This is an appeal from the Circuit Court for the Western District of Tennessee. Motion having been made by appellees to dismiss the appeal for want of jurisdiction, the motion was submitted upon briefs, and the court ordered that the question should be presented upon the final hearing of the cause.

The motion was based upon the assumption that the sum or value in dispute did not exceed five thousand dollars.

I have but little to say upon this subject, in addition to that which has been said in the printed brief upon file, to which I beg to refer. The suit was for the enforcement of

Omberg's trust in favor of the general creditors of Boyle & Co., which involved the assertion of his title to the proceeds of the partnership assets, to the entire exclusion of the claim of Mr. Davis, upon the sole ground that Mr. Davis was a partner in the firm of Boyle & Co. This fund exceeds $5,000. Omberg's claim extended to the whole of it; Mr. Davis asserted title to more than $5,000.

The case of *Oliver*, et al, v. *Alexander*, et al. 6 *Peters*, 143 was an appeal by the holder of a fund attached, from decrees in favor of certain seamen for wages, no one of which exceeded nine hundred dollars.

Story J. says: "The present is a case of seamen's wages, in which there is necessarily a several and distinct contract with each seaman, etc.; and though all may sign the same shipping paper, no one is understood to contract jointly with, or to incur responsibility for any of the others;" and after stating that by particular favor, seamen may join in one libel, says further: "But although the libel is thus in form joint, the contract is always treated in the admiralty * * * as a several and distinct contract with each seaman." "The defence which is good against one seaman may be wholly inapplicable to another. One may have been paid, another may not have performed the service, and another may have forfeited in whole or in part his claim to wages. But no decree whatsoever, which is made in

regard to such claim, can possibly avail to the prejudice of the merits of others which do not fall within the same predicament; and wherever, from the nature of the defence, it is inapplicable to the whole crew, the answer invariably contains separate averments, and is applied to each claim according to its own peculiar circumstances." "The decree follows the same rule," etc. "The whole proceeding therefore from the beginning to the end of the suit, though it assumes the form of a joint suit, is in reality a mere joinder of distinct causes of action, etc."

The remarks of the court are evidently of and concerning a litigation between the several parties as to whether the separate claims were due, their amount, etc., and might have involved their priorities. These matters involved, as the court remarks, a contest between the seamen and the holder of the fund, not necessarily touching the title to the fund specifically, but their separate individual rights to appropriate specific portions of that fund; and also a contest between the seamen themselves, each pursuing his several course, first to establish a claim for money (wages), and secondly to apply an equal amount of a certain fund to its liquidation. This appeal was dismissed.

The appeal in the same cause was sustained in 5 *Peters*, 675, because the question then was only "whether the funds in the hands of the assignees were liable to the claims of the seamen in point of law."

The libel having been dismissed as to all the libellants "without any inquiry into, or ascertainment of, the claim of any one of them." In other words, the first had for its object the setting of a principle which involved the whole fund, and the claim of each libellant freed from any and all questions as to the validity, amount and priority of the separate claims.

If several are jointly interested in a mortgage as grantees or grantors, their joint interest determines the right to appeal, though as between themselves it is divisible, or to be borne in a certain definite proportion. If one acting in a trust capacity enters into a litigation concerning the title to the trust property, its amount or value determines the right, though the *Cestius que trustent* may be, as between themselves, entitled to certain small shares. This results from the fact that the aliquot parts are not in controversy, but the whole matter as a unit.

The case of *Seaver* v. *Bigelows*, 5, Wall, 208, was a creditors' bill. It was sought to appropriate a fund exceeding $2,000 to the payment of two judgments aggregating less than $2,000, viz: $1,827.95. It was a fallacy to claim that a fund exceeding $2,000 was in controversy in that cause, for the complainants had no interest in it, or claim upon it in any event, exceeding the amount of their judgments. The excess would remain the property of the

holder. It is not even the case of property incapable of division exceeding the value of $2,000 ordered to be sold in order to realize smaller amounts, for apparently a mere payment of money held in hand would have discharged the complainants claims.

Creditors who file a bill to appropriate property, are held by this decision to be pursuing separate and individual rights to certain parts of the fund or property, not a joint or representative right to the whole of it, each pursuing his separate way, but pursuing it, for convenience sake, in the same suit; and the remarks would apply as are quoted from the judgment of *Story*, *J.* in 6 *Peters*. Some of the claims may have been invalid, others paid, etc., giving rise to endless controversies concerning separate persons and distinct causes of action.

The case at bar is different from the forgoing, inasmuch as the claims or demands are not in controversy, either between the creditors and the debtor, or between the creditors themselves, as was said by *Story*, *J.*, concerning the case in 5 *Peters;* no inquiry was made nor ascertainment of the validity or the amount of, the individual claims. In this, as in that case, the question is whether, in point of law, a certain fund as a unit, is liable to a *class* of people, not particularly to the individuals.

But this case goes further. The bill was intended to enforce a trust. The claimants were interested in the fund,

but the matter in controversy is not represented so much by the joint interest as it is by unity of title to the fund; that is, it is the fund as a unit, as a trust fund, that is the matter in controversy.

Omberg, the trustee was a party to the suit below. By the order of the court, and the consent of parties, he was dismissed from the cause. His mantle fell certainly upon somebody's shoulders. His title remained in the suit to be dealt with by the court, otherwise there would be a defect of parties, and he would not be bound by the decree. The decree of the court below related to, and was grounded upon that title, and that only. The test is, what would the judgment of this court be, in case it entertains jurisdiction and enters a decree, contrary to that below or rather in accordance with our contention. It would necessarily be no more than that the fund, as a unit, is subject to the claims of the creditors, whoever they may be, and there may be others not represented in this case, and remand the case in order to have the fund paid to Omberg, or that the court below may take upon itself the administration of the fund through the proper instrumentalities for the benefit of those concerned, excluding the claims of Mr. Davis.

THE QUESTION OF PARTNERSHIP.

The sole question upon the merits of the cause is whether Mr. Davis was a partner in the firm of Boyle &

Co. as to creditors. If he was, he has no claim upon the fund in Court.

The agreement between the parties is correctly set forth in Exhibit No. 1, to Mr. Davis' answer. In substance, it provided that Mr. Davis should advance to Boyle & Co. $25,000, and should receive, as compensation for its use, a sum equal to one-third the net profits of the business of the firm. This constituted Mr. Davis a partner as to third persons, creditors of the firm.

1. By the Common Law, participation in profits constituted partnership as to creditors. The rule was *general and unqualified.*

Grace vs. *Smith*, 2 W. Blacks. 998.
Waugh vs. *Carver*, 2 H. Bl. 235.
S. C. Smith's Lead. Cas. Vol. 1.
American Law Rev. Vol. 2, p. 1. Art. *Liability as Partner*, and authorities cited.
Bigelow vs *Elliot*, 1 Cliff 28.
Berthold vs. *Goodman*, 24 How. 542.
Hazard vs *Hazard*, 1 Story.

2. The general principle above stated still prevails in the United States; but, in the Federal Courts, and in all but four or five of the States, a number of exceptions have been recognized. These exceptions are in favor of

1. Agents and employees generally.
2. Factors.

3. Ship-owners, mill-owners, farm-owners, hotel-owners.

These exceptions are simply exceptions; they do not destroy, but prove, the rule, and sustain it. *All the authorities which can be cited by counsel for defendant, will fall within one or the other of the above classes.*

That these are exceptional cases is shown by the following authorities.

Canfield vs. *Andrews*, 37 Conn. 250.
Dalton Co. vs. *Dalton*, 33 Ga. 243.
Pierson vs. *Steinmeyer*, 4 Rich. 310.
Berthold vs. *Goldsmith* 14 How. 542.
Bigelow vs. *Elliot*, 1 Cliff, 28.
Leggett vs. *Hyde*, 58 N. Y. 272.
Bently vs. *Harris*, 10 R. I. 434.
S. C. 14 Am. R. 695.
Story, on Part. Sec. 67.

3. It is wholly immaterial that the parties, having agreed that the profits shall be divided, declare that they shall be called, not "profits," but "compensation." The inquiry is, in what character are they received,—in the character of employee, or of principal? What is the true relation between the parties as a matter of fact, not what they have chosen to designate it. A conclusive test is found in this: If the party stipulating for profits be in fact an

agent, clerk, or factor, or otherwise within any of the recognized exceptions to the general rule, he may stipulate for "profits" to an indefinite extent, and, although called "profits," they are, in law, but "compensation." Persons not within any of the exceptions, may stipulate for annuities, or specific sums of money, payable from the "profits;" but if they stipulate for a portion of the profits, *i. e.* a share of the profits, they are partners, as to third persons, because the "amount is casual, indefinite, and dependent wholly upon the results of the business." This is the test given by that great Master of English Jurisprudence, *Sir Wm. Blackstone*, in his judgment in *Grace* vs. *Smith* and adopted by that great Master of American Jurisprudence, *Joseph Story*, in his work on Partnership, Secs. 65, 66, 67. This is what is meant by taking profits "as profits," or taking profits "as principle," and the nature of the relation is not changed by the nomenclature used by the parties in characterizing it.

Two or more persons can not combine their capital in business, share net profits, and yet prevent that relation from being a partnership relation by declaring that it shall not be deemed such. The law will determine its character with reference to the substance of the agreement.

WM. M. RAMSEY,

Solicitor for Complainants.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

CHATFIELDS, WOODS ET AL,
Appellants,
vs.
BOYLE, DAVIS ET AL.
} No. 150.

BRIEF FOR DAVIS, APPELLEE.

This suit was commenced in the State chancery court of Shelby county, Tennessee, and was, after considerable progress had been made there, removed into the circuit court of the United States, whence it comes by appeal to this court. The appellants here were plaintiffs below and their bill was dismissed.

THE CASE.

Boyle & Chapman, in 1873, had become indebted to one Pettit for various sums, advanced in payment of accomodation endorsements, and they conveyed certain property to Cooper to secure Pettit's debt, which, as it ultimately turned out, amounted to $2,524.17. Record, p. 30.

Subsequently, in 1874, Boyle & Chapman borrowed of Mr. Jefferson Davis, besides other considerable sums, one particular amount of $25,000, agreeing to pay him in lieu of interest a sum equal to one-third of the net proceeds of their business, which was that of booksellers, stationers and printers. In February, 1876, the firm of Boyle and Chapman was dissolved, and in March, 1876, Boyle, individually, made a deed conveying to one Hayes the same property which had been conveyed to Cooper, and an iron safe, &c., upon trust to secure the debt to Davis.

Subsequently in November, 1876, Boyle, trading as Boyle & Co., made an assignment to one Omberg for the benefit of all his creditors.

Some of the general creditors claiming the benefits of this assignment to Omberg, filed, January 13, 1877, this bill in the State court for the purpose of declaring void the deeds to both Cooper and Hayes and subjecting the property included therein to the Omberg assignment. The purpose, however, as regards the Cooper deed was immediately abandoned, and the suit was prosecuted to avoid the Hayes deed only.

This deed was sought to be avoided, because it was alleged that Davis, by making the loan to Boyle & Chapman upon the terms stated, had become a partner in the firm, and, therefore, it was further supposed the deed for his benefit was void; and it was insisted that the property pledged for his debt should be turned over to Omberg. Omberg was a party complainant in this bill, adopting all the allegations made by Chatfield and Woods, and offering either to proceed with the execution of his trust under the direction of the court or to retire from it and let the court administer the trust itself. Within a few days (6 days) after the filing of the bill, by consent of all parties the court ordered that Cooper should proceed to sell the property described in the deeds to him and Hayes, and after paying expenses and Pettit's debt, deposit the balance subject to the order of the court. This he did, and deposited $2,951.10. Record, p. 30.

Omberg, as soon as the assignment was made to him, had proceeded to sell off the property conveyed to him and to collect debts, &c., and about the time of the filing of the bill he received an offer for all the residue of the property, amounting to $3,200, and with the leave of the court he accepted this offer (Rec., pp. 14, 15) and so closed

out the concern. He reported his proceedings to the court, stating that the debts of Boyle & Co. amounted to $44,757.10, including those of Davis and Pettit, and that the net fund in his hands would enable him to pay 15 per cent. which he said he was then paying to the creditors except Davis, whose dividend, 15 per cent. on $25,000, ($3,750), he offered to pay into court. (Rec., pp. 15, 17, 18.) The court directed him so to do, and he paid it in. (Rec., pp. 16, 17,18.)

Subsequently Omberg, upon his motion, was allowed to dismiss his bill, and the bill as to him was dismissed. Rec., p. 35.

Some other creditors came in and were allowed to be made parties complainant, and on the 20th day of April, 1877, the suit was, on the petition of the then parties complainant, removed into the United States circuit court. Rec., 39.

Upon the hearing, the right of Mr. Davis to the residue of the proceeds of the property conveyed to Cooper and Hayes was sustained, and it was ordered to be paid over to him, as well as the amount of his dividend paid into court by Omberg (Rec. p. 59.) From this decree an appeal was taken by all the creditors who had become parties to the suit. Rec., p. 59.

I.

For the appellee the following points are made:

First. That the amount in controversy is not sufficient to give jurisdiction to this court. That amount is represented by the interest which each complainant has in the fund, and their united interest in the fund, and *a fortiori* any separate interest, does not reach $5,000.

Second. That the agreement under which Mr. Davis loaned the money did not constitute him a partner of Boyle & Co.

Third. That if he was a partner, the debt was not due from the partnership of which he was a member, nor was the fund derived from that partnership.

1.

As to the amount in controversy.

The debts of the concern were reported by Omberg to be $44,757.10, including Pettit's and Davis.' Deducting Pettit's and Davis', say, $27,524.17, and the residue of the creditors' claims is $17,233.63.

The appealing creditors' claims were originally as follows, before any payments made thereon:

Rec. p. 2. Chatfields & Woods.....	$3,440 37
Rec. p. 32. Powers Paper Co. (Ap. B., p. 5.)..	2,689 60
Rec. p. 32. Ed. Hoole (Ap. B., p. 5.).....	1,232 61
Rec. p. 32. S. Snider's Sons. (Ap. B., p. 5.)...	1,103 76
Rec. p. 43. H. B. Graham & Bro.....	318 41
Rec. p. 44. S. A. Tower & Co.....	887 68
	$9,672 43

Thus the matter in dispute between any one appellant and the defendant does not reach $5,000 or $4,000.

Moreover, the *aggregate* interest of *all* the appealing creditors in the fund is less than $5,000.

For the aggregate of the two funds paid into court, viz., by Cooper.....	$2,951 10
And Omberg.....	3,750 00
is only.....	$6,701 10

Then as the amount of all the claims.....	$17,233 63
Is to the entire fund.....	$6,701 10
So is the aggregate of all the appealing creditors claims.....	$9,672 43
To their aggregate interests in the fund.....	$3,646 82

Which is less than the jurisdictional amount.

1. It is the separate demand of each appellant, and not the aggregate, that is the test of jurisdiction.

Oliver *vs.* Alexander, 6 Peters, pp. 143, 149.
Stratton *vs.* Jarvis et al., 8 Peters, 4, 11.
Rich et al. *vs.* Lambert, 12 How., 347, 352.
Seaver *vs.* Bigelow, 5 Wall., 208, 210.

The separate demand of each being less than $5,000 the court has not jurisdiction.

(*a.*) Oliver et al. *vs.* Alexander et al., 6 Peters, 143.

Libel for seamen's wages: Decree awarding to seventy-eight libellants, $32,872.30, to be paid them pro rata, but to no one so much as $1,000. Respondents appealed; appeal dismissed "upon the ground that the sum in controversy in each case was less then $2,000."

By the court: "It it is very clear, therefore, that no seaman can appeal from the district to the circuit court unless his own claim exceeds $50; nor from the circuit court to the Supreme Court, unless his own claim exceeds $2,000."

(*b.*) Stratton *vs.* Jarvis, 8 Pet., 4.

A salvage case: The aggregate salvage awarded exceeded $2,000. Appeal by respondents. It did not appear that any respondent was to pay $2,000, and appeal dismissed.

(*c.*) Rich *vs.* Lambert, 12 How., 347, 353.

Libel by owners of goods damaged: Decree in favor of some for more than $2,000, and of others for less than $2,000. Respondents appealed. Appeal dismissed as "to all the cases except the two in each of which the amount in the decree exceeds the $2,000." By the court: "*Clearly a libellant could not have appealed unless his claim exceeds* $2,000. Nor can the respondents, upon the same principle, unless the amount decreed against him in the particular case exceeds that amount."

(*d.*) Seaver *vs.* Bigelow, 5 Wallace, 208.

Creditor's bill: Complainant's claims were each *less* than $1,000, the fund *more* than $2,000.

By the court: "The creditors who have joined in this bill have separate and distinct interests, depending upon separate and distinct judgments. In no event could the sum in dispute, of either party, exceed their judgment, which is less than $2,000. The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each.

* * * * * * *

"It is true the litigation involves a common fund which exceeds the sum of $2,000, but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. * * * * The case is analogous to proceedings in admiralty in behalf of seamen's wages, and salvors for damages, where the practice of the court is well settled."

(*e.*) Terry *vs.* Hatch, 93 U. S., 44.

This was a suit by creditors against an insolvent bank, which had made an assignment for their benefit. The amount realized under this assignment was $30,000, the pro rata distribution of which was decreed by the court. Among the creditors were one Terry and one Hatch. Terry filed an exception to the allowance of Hatch's claim, which was overruled. He then, by leave of court, took a separate appeal without joining any party to the record as appellant with him, or any party as defendant except Hatch. It was held that the amount in dispute, was the interest of Terry in the portion of the $30,000 payable by the decree to Hatch, which the former would have received had his exception been sustained, and the amount decreed the latter been distributed pro rata among all the creditors. As that

interest amounted to less than $2,000, the court had no jurisdiction.

Here the appealing creditors occupy the position of Terry, and Mr. Davis the position of Hatch; and the amount in dispute is the interest of the appealing creditors in the portion payable by the decree to Davis, which portion the creditors would have received had their objection to Davis' claim been sustained. That, as we have seen, would have been less than $5,000.

It seems to be conceded in the argument on the other side, that these appellants cannot sustain the appeal, unless by considering that the appealing creditors represent Omberg himself, and it is said "his mantle fell certainly upon some person's shoulders," (p. 6), when he retired from the case. We do not concede that it did. But if it were admitted that these claimants could sustain any appeal which Omberg could sustain were he here, still the appeal cannot be upheld, for if Omberg were here, he could only appeal from that part of the decree which gives to Mr. Davis the Cooper and Hayes fund, $2,951.00. As to the rest of the fund, Omberg could not have appealed from the decree which gives it to Mr. Davis, for Omberg had voluntarily submitted himself to the direction of the court, and he had been directed to pay into court $3,750, all the money which he admitted to be due to Davis. He satisfied that decree and paid over the money. He took no appeal from that decree. He made no exception to it. He paid in that money as a fund with which he had no further concern, claiming no part of it for himself, or for any other person. He then dismissed his bill voluntarily by leave of the court. Nor if his bill had not been dismissed, could he have appealed from an order awarding that money to Mr. Davis. It was not an order which in any way whatever affected him or any persons whom he represented: for he did not

represent these appellants any more than he represented Mr. Davis, under the general assignment. The fact that the money had been taken out of his hands by order of the court gave him no subsequent right to interfere in its disposition. If he ever had a right to appeal from anything, he could have had the right to appeal only from the order to pay the money over; but he could not have appealed from that because it was made on his own prayer and so was made with his consent.

By the several consent orders made in the case all the trusts were executed and the property turned into money, the money brought into court, and the trustee, Ornberg, who represented all creditors, was discharged. The case was thus reduced to a pure contest for the distribution of the fund, precisely as was the case in Terry *vs.* Hatch. In this contest a small number of the creditors, representing about $9,000 of $17,000, joined as against Mr. Davis, and the amount in controversy between those creditors who have appealed here, and Mr. Davis, is such proportion of the whole fund, $6,354.91, as $9,672.43 bears to $17,233.61, which as we have seen is much less than $5,000

II.

As to the alleged partnership.

The question whether participation in the net profits of a firm in compensation for a loan of money constitutes the lender a co-partner, is fully discussed upon principles of the general commercial law, and especially as that law is held in Tennessee where the transaction occurred, in the brief of Mr. J. W. Clapp. To this I can add nothing but the suggestion that in the case of Cox *vs.* Hickman, the House of Lords declared that the case of Waugh *vs.* Carver was not a correct statement of the law of England; and that according to the law of England, a parti-

cipation in net profits never did of itself constitute partnership.

In England, the erroneous decision was canceled by the statute of 28 and 29 Vict., C. 86. In the course of the debates, the member who introduced the bill said the object of the bill was not to change the principle of the law, but to restore the law to what it ought to be. (Hansard's Parl. Debates, vol. 178, p. 1277.) Another said the law of liability in partnership rests upon the decision of one particular judge; and the correctness of it has been questioned by the best lawyers in the kingdom. (*Ibid*, p. 1285.) The Attorney-General said the object of the bill was to repeal an arbitrary law, established by judicial authority alone, which intefered with the law of principal and agent; and nothing could be more irrational than such a law; it arbitrarily interfered with the actual meaning of the parties; and no practical man could understand the subtle distinctions to which the law itself has given rise. Every writer who had referred to this part of our law had condemned it; and its maintenance could not be essential to our commercial prosperity. (*Ibid*, p. 1290.) In the debates of the House of Lords on this question, the Lord Chancellor said the object of the bill was to free the law of partnership of an anomaly founded on the erroneous decision [of Waugh *vs.* Carver], pronounced many years ago, and which had led to most mischievous consequences. The principle of the law of England, as construed by this decision, went to the extent of declaring that, in any case where a person received in any form any portion of the profits of an undertaking, he was to be held liable "to his last shilling," notwithstanding any agreement to the contrary between the parties; but this principle is unjust, and repugnant to the principles of English law. (*Ibid*, vol. 180, p. 119.)

By this statute, he who shares in the profits of a partnership is exempt from liability as a partner for its debts

in the following instances, viz., *when such profits, are received as remuneration for the use of money lent a partnership;* when they are received in addition to, or in lieu of, wages for labor performed in the capacity of servant or agent of the partnership, &c.

This statute is not to be regarded as changing the law, but a statute declaring the law. In speaking of a similar British statute this court has recently declared (in the case of Conner *vs.* Long), such a statute is evidence that the precedent should never have been established. The Court said: "This legislation we regard as evidence of the highest character that the rule in question ought never to have been judicially established. Its effect was not so much to change as to restore the law."

In this case, however, there was no contract to share in the profits. The profits were referred to merely as a measure of what the compensation for the use of the money should be. The decisions making partners those who share in the profits have proceeded upon the ground that the defendant received money which otherwise would have gone to the creditors of the firm, and that one who should intercept what really belonged to them, should be held liable to them. But in the case in hand, there was no agreement that Mr. Davis should receive any of the profits, and this is a material difference. He could not intercept the profits. He had no right in them or to them. He could call for no account of them nor could he in any possible way hinder the creditors in reaching them. All the concern he had with the profits was simply to know their amount, and that, he would in a controversy with the borrowers, have had to prove by the means which were available to any other claimant against the firm.

In the case of Bullen *vs.* Sharp above cited, there was a similar feature, the defendant having stipulated for "a

yearly sum equal to one-fourth of the said net average annual profits." Said Baron Bramwell: "This would not make the defendant a receiver of the profits, nor give him a right to an account, nor in fact bring him within any of the old fancied rules of liability." The annuity, he said, was to be paid, "not out of the profits," but "in proportion to the profits." This notion of liability by operation of law, he said, "I believe has caused more injustice and mischief than any bad law on our books.

See his opinion, 1 Law Reports, pp, 128–9.

III.

This fund not partnership property.

But it is to be remembered that this is a contest for a fund. It is not an action against Mr. Davis to render him liable for the debts of Boyle & Co. The object of the suit was to prevent a certain fund dedicated to the payment of his loan from reaching him, at least until complainants' demands had been satisfied. True, certain expressions in the bill indicate that the complainants supposed they were claiming "to look to Davis as a partner and to recover their debt from him individually" (folio 15), but there is no prayer for a personal judgment against him, nor could a bill in equity by a number of creditors uniting to obtain separate decrees against a defendant on notes and open accounts, possibly be sustained under any system of equity. The bill is then simply directed to the funds; and the question is whether Mr. Davis is entitled to have the funds—one or both—applied toward the satisfaction of his debt.

And for the appellee it is insisted that whether he did or did not become a partner by the agreement in question he is, nevertheless, entitled to the funds which he claims.

The doctrine relied on by the appellants can be no other than this: That a partner cannot take a lien on partner-

ship property to secure a debt which the partnership owes him, in preference to other creditors.

But Mr. Davis, if he was a member of any partnership, was not a member of that partnership which was his debtor; and if he took security upon the property of any partnership, it was not the property of that partnership of which he was a member.

The loan which he made was to Boyle & Chapman, and he held their notes for the amount of the loan. Rec., p. 24.

The property which was hypothecated as security for the loan was the private individual property of Mr. Boyle. Rec., p. 25.

Mr. Davis could have recovered judgment in an action at law upon the notes and levied upon the property in question. For though men be partners, they may contract together outside of the partnership as individuals, and enforce such contracts at law, as any other persons may; and such contracts are outside of the partnership whenever one partner individually contracts with the other individually, even although such contracts have for object to launch the partnership or to provide capital for it.

See this subject fully treated in Wood's edition (1878), of Collyer on Partnership, chap. x, and notes to sections 196, p. 322, and 256, p. 396. The latter note states the following rule:

"If the action can be tried and determined irrespective of the state of the partnership accounts between the parties, and if the sum sought to be recovered will not belong to the firm but exclusively to the plaintiff, then, as a general rule, the action is maintainable." Citing:

Barring *vs.* Lyman. 1 Story, 396.
Scott *vs.* Campbell, 30 Ala., 728.
Mullany *vs.* Keenan, 10 Iowa, 224.
Currier *vs.* Rowe, 46 N. H., 72, and others.

In Mullany *vs.* Keenan, two co-partners covenanted to pay a third person one-third of the profits made by them in a past transaction in consideration of his becoming a member with them in a new firm composed of the three. *Held*, The new member could maintain an action at law against the two others on such covenant. "The promise to pay was not that of the new firm and there was consequently no necessity to resort to a court of equity * * * The agreement is much the same as if Leeman and Keenan had promised to pay the plaintiff a sum certain."

Some other grounds of liability were alleged in the original bill, but they were either withdrawn by an amendment (Rec., p. 58), or have never been urged in argument. It is unnecessary, therefore, to notice them.

Conclusion.

1. The appeal should be dismissed for want of jurisdiction.

2. The decree below should be affirmed.

J. D. McPHERSON,
Solicitor for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881. NO. 150.

W. H. CHATFIELD, ET AL.

VS.

W. F. BOYLE, ET AL.

BRIEF OF J. W. CLAPP, FOR JEFFERSON DAVIS.

Tracy & Co., Printers.

W. H. CHATFIELD, ET AL.

vs.

W. F. BOYLE, ET AL.

BRIEF OF J. W. CLAPP, FOR JEFFERSON DAVIS.

The first question to be considered is the one of

JURISDICTION.

The record shows that in January, 1877, Chatfield & Woods, a mercantile firm of Cincinnati, Ohio, filed the bill in this cause in the chancery court of Shelby county, Tennessee, in the behalf of themselves and other creditors of Boyle & Co., and J. A. Omberg, a citizen of Tennessee, as assignee of Boyle & Co., against W. F. Boyle and others, including the defendant, Jefferson Davis, for the purpose of recovering an indebtedness of $2,797 79 alleged to be due Chatfield & Woods by Boyle. Boyle, who was engaged in the stationary and printing business, on the 30th of June, 1873, executed a trust deed to J. C. Cooper, upon certain personalty to secure a debt due J. T. Pettit, and in March, 1876, executed another deed upon the same and other property to J. A. Hayes, as trustee, to secure a debt due Jefferson Davis. In November, 1876, Boyle made a general assignment to J. A. Omberg for the benefit of all his creditors. The bill sought to set aside the trust deed made to secure Davis and to hold Davis as a partner of Boyle.

The various creditors of Boyle, whose names appear in the record, came in, were admitted as partners and filed their claims, and on the 23d March, 1877, the following order was made dismissing the bill as to Omberg:

"In this cause, it appearing to the court by a statement of J. A.

Omberg, that all the creditors who have demanded of James A. Omberg, the assignee, to join in this litigation, have come in and had themselves made partners herein, it is therefore, on motion, ordered that this bill be dismissed so far as said Omberg is concerned, and he go hence without day."

This dismissal as to Omberg, the only home complainant, was evidently made with a view to give jurisdiction to the United States court, and on the 4th April, 1877, the non-resident creditors of Boyle filed their petition to remove the cause from the State court into the circuit court of the United States, for the District of West Tennessee, and on the 20th April, 1877, an order to that effect was made.

The claims of complainants vs. Boyle, as they appear of record are respectively as follows:

Chatfield & Woods	$2797 79
Powers Paper Co.	2594 00
Edwin Hoole,	1229 51
Louis Sniders' Sons,	994 92
H. B Graham & Bro.,	256 58
S. A. Tower & Co.,	712 25

These amounts are not precisely accurate, but show that there is no *one* of them that approximates the amount necessary to give this court jurisdiction, and as each complainant or appellant presents a distinct and separate claim, it is not conceived upon what possible ground the appeal can be sustained. As long as Omberg was a party, as general assignee, he might be said, in one sense, to represent the aggregate claims of the creditors for whose benefit the assignment was made. It is not conceded, however, that even were he properly a party of record and united with the creditors in the appeal that this would give this court jurisdiction. Spear vs. Place, 11 How. 522. But this is a question that need not be considered, as he was never a party to the cause after its removal from the State court; and the numerous adjudications of this court settle the question beyond controversy.

Oliver vs. Alexander, 6 Pet., 143.
Stratton vs. Jarvis, 8 Pet., 41.
Rich vs. Lambert, 12 How., 347.
Seaver vs. Bigelow, 5 Wall, 208.
Paving Co vs. Mulford, 10 Otto, 147.

ON THE MERITS.

The want of jurisdiction is regarded as so apparent that it is deemed scarcely necessary to consider the case upon its merits ; but if this be done, it is believed your Honors will without hesitation affirm the decree of the court below. The principal question involved, and the only one that need be discussed, is as to the construction of a contract or agreement between the defendants, Boyle & Davis.

The proof shows that in the spring of 1874, Boyle, under the firm name of Boyle & Chapman, was engaged in the book-bindery and stationary business in Memphis, Tenn.; that in the course of his business pursuits he ascertained that Mr. Davis had some surplus funds, and desirous of getting the use of them he proposed to Mr. Davis to become a partner in the bindery and stationary business, which he represented to be quite remunerative. This Mr. Davis promptly and positively declined, but being kindly disposed toward Boyle, stated that he was willing to let him have the use of a sum of money, for which Boyle was to pay him out of, or according to the profits of his business, provided this could be done without Mr. Davis incurring the liability of a partner. For the purpose of determining whether such an arrangement was practicable, they both repaired to the office of J. W. Clapp, who was the legal adviser of Mr. Davis. At this interview, Clapp states in his deposition (Record p) "A paper memorandum of an agreement looking to such an arrangement as that suggested by Mr. Davis was produced and handed to witness (Clapp) for his inspection. Having refreshed his memory as to the doctrine, as recognized by the Supreme Court of Tennessee, by turning to two or three reported cases to which the attention of Mr. Davis was called, he, Clapp, stated the principle as announced by the Supreme Court to be that the fact of partnership was a question of *intention*, and that an agreement to pay Mr. Davis a specific proportion of the profits of the business of Boyle & Chapman for the use of his money by the firm would not of itself make Mr. Davis a partner of theirs. Out of abundant caution, however, witness shaped the memorandum of the agreement referred to, so as to provide that the compensation should not be a part of the profits, but *equal to* a specific portion of the profits." Mr. Davis, at the same time, expressing a kindly feeling for Boyle and a willingness that his compensation for

the money loaned should depend upon Boyle's comparative prosperity in business.

The statements of Clapp as to the nature and purport of the agreement between Davis and Boyle is in all respects corroborated by the testimony of each of these parties (Record p) and whatever the legal effect of such an agreement may be, there is no controversy as to the question of intention.

The proof further shows that at no time after making the loan to Boyle, or Boyle and Chapman, did Mr. Davis act otherwise than as a *creditor* of the concern. He took their notes for the amount loaned, being five in number, for $5,000, each payable one day after date, and the only restriction as to his right to demand payment was, that before requiring payment of any one of the notes he was to give reasonable notice of his intention to do so, that Boyle & Chapman might not be taken by surprise. He never interfered in any manner whatever with their business; never set up any claim to the profits; never inspected their books, or claimed the right to do so; never saw the account they kept with him, except some fragmentary statements handed to his agent during his absence in Europe; and after he had been frequently disappointed in regard to promises to refund him his money, being apprehensive as to its safety, he obtained from Boyle a deed of trust upon the machinery, fixtures etc., for his protection, which, if he had realized the full benefit thereof, was wholly inadequate as a security. There is no pretense that he has ever held himself out as a partner or was cognizant of being so held out, or that any one of complainants contracted their debt with Boyle or extended credit to him upon any representation or belief that Mr. Davis was a partner (See Boyle's deposition and complainants amended bill; p.) The ole and simple question is, whether the agreement, as a matter of law, in opposition to the declared and express intention of the parties, constituted Mr. Davis a partner as to third persons?

Questions relating to commercial partnership are, it is true, matters pertaining to the general law of contracts and the decisions of the State courts in reference thereto are not therefore binding upon the courts of the United States, but yet the Federal courts will give a liberal application to the rule that a contract between citizens of a State, valid by the laws of such State as expounded when the

contract is made and as enforced by the courts of the State, will be recognized as valid by the Federal courts. Any other course of decision would render uncertain and insecure the great bulk of business transactions throughout the country.

Ohio Life Ins. Co. vs. Debolt, 16 How., 432.
Gelpcke vs. Dubuque, 1 Wall. 175.
Havemeyer vs. Iowa City, 3 Wall. 303.
Olcott vs. Supervisors, 16 Wall. 690.

Now, there is no question about the fact as to how the law of Tennessee, as expounded by her highest judicial tribunals, stood at the time the agreement referred to was made between Mr. Davis and Boyle; neither is there any room to doubt how the case would have been decided had it not been removed from the State court, and it is apparent that the removal was made for the express purpose of evading the decision that the State courts would have been bound to make. The agreement, as appears from the proof, was made upon the advice of a lawyer of forty years' experience in his profession with the law of Tennessee as expounded by her Supreme Court immediately under his eye, and with reference to the mode of dealing among the citizens of the State in view of the law as so expounded.

The case of

Polk vs. Buchanan, 5 Sneed, 722,

was no doubt one of the cases consulted and is a controlling case in the State on questions of partnership. The syllabus of that case is:

"1st. The question as to whether or not a partnership exists, is a question of fact open to proof in the ordinary modes, whether or not a partnership exists by the intention and agreement of the parties.

"2d. If the fact be clearly shown that no partnership was intended by the parties, a mere stipulation that a party shall receive a specific proportion of the net or gross profits of a business, or an ascertained amount payable out of the profits, as a compensation for services, benefits or advantages rendered the business, will not make such party liable as a partner to third persons, provided he has not permitted the use of his name, or suffered himself to be held out as a partner to the public."

The facts of the case, so far as it is necessary to state them, are that James & Son were engaged as partners in the manufacture of iron in Tennessee, and in order to raise money to carry on their business they had procurred the defendant, Buchanan, who was a commission merchant residing in Cincinnati, Ohio, to accept drafts for their accommodation to the amount of $8,000, and in order to indemnify him, amongst other things, an agreement was entered into which contained the following stipulation: "And it is understood that the said Robert Buchanan shall receive, after the 1st day of January 1854, *one fourth of the net profits of said furnace*, in consideration of his said advances of $8,000, and his having agreed to furnish the necessary facilities, through his acceptances, to carry on said business, in such sums as may be necessary for the same."

James & Son became insolvent, and Polk, one of their creditors, sought to hold Buchanan liable as a partner on this agreement. The Supreme Court reviews in an elaborate opinion the different cases on the subject of partnership, refers to the conflict of authority, and then deliberately fixes the rule as to partnership contracts within the State as announced in the syllabus, and that rule has never been departed from to this day, but has been repeatedly affirmed.

Harwood vs. Jarvis, Trabue & Co., 5 Sneed, 377.
England vs. England, 1 Bax. (57 Tenn.) 108.
Bell vs. Hare, 12 Heisk. 615.

Conceding, then, that under the rules of law relating to partnerships as expounded and applied in Tennessee, the transaction between Mr. Davis and Boyle did not constitute them partners either *inter sese* or as to third persons, would it comport with the administration of justice to impose upon the parties the liabilities and obligations of a contract or agreement which they not only never made, but expressly declined to make, by depriving them, by a mere change of the forum from the State to the Federal courts, of the benefit of the law as interpreted and applied in the place where the agreement was made?

Even if the rulings of the Supreme court of Tennessee were in direct conflict with those of this court, or with the general current of authority, still as this was a Tennessee transaction, occurring between citizens of that State, made with express reference to the

law of the State, and to be performed within the State, it is believed that your Honors would not be willing to render a decision that would operate with great hardship upon a large class of commercial transactions within the State wherever there was a non-resident creditor who could shift the theatre of litigation from the State to the Federal tribunals. In such an unfortunate and disastrous conflict of authority the citizen who might be possessed of surplus capital would never know when he was safe in lending it to one who was engaged in mercantile pursuits.

The Circuit court of the United States, from which this case was appealed, thought that justice as well as public policy required that the transaction between Davis and Boyle should be interpreted as authorized and required by the rule established by the highest judicial tribunal of the State where the agreement was made and which was intended to be, and is, a rule of conduct to the citizens of the State in such transactions. The same court in a more recent case, before a different judge, adopted the same course of decision.

In re Ward & Co. in Bankruptcy, 25 Int. Rev. Rec. 289; S. C. 8 L. and Eq. Rep. 136.

In this last case the precise question of a loan of money to a Tennessee merchant to be employed in his business and compensated for out of the profits was involved.

Nor, is there any reported decision of this court that conflicts with the ruling of the circuit court in the cases above named. The rule laid down in Waugh vs. Carver, 2 Hy. Black, 235, that a participation in the profits of a mercantile concern, *ipso facto* and without reference to intention, constitutes the participant a partner as to third persons, which was founded upon a *dictum* of Ch. J. De Grey in Grace vs. Smith, 2 Wm. Black, 998, is not now recognized as an authoritative rule of law in either England or America. In Cox vs. Hickman, 8 H. of L. Cases 268, it is expressly overruled and the rule of *intention* substituted in its place, after a very thorough discussion, in which several concurring opinions were delivered, and from that day to this Cox vs. Hickman is referred to as the proper interpretation of the law of partnership in England. See especially

Bullen vs. Sharp, 1 C. Pleas Cases, 268.
Mollro vs. Court of Wards, L. R., 4 Pres. C. 419.

In Dean vs. Harris and Harris vs. Butterfield, Law Times Rep. N. S. 639, there was a loan of money by Harris to Butterfield to engage in mining, the money to be repaid with 20 per cent. interest and H. to be entitled to three-fourths of the profits of the business. The Vice-Chancellor held: "All that Harris did was consistent with his character as capitalist, assisting Butterfield in carrying on business. If this could constitute a partnership it would be most unsafe for any man to lend a tradesman any sum of money and to look after the best means he could get for its payment."

The American authorities are not in accord, some adhering to Waugh vs. Carver, whilst the major part in number and weight adopt the rule of intention.

In Berthold vs. Goldsmith, 24 How., 536, this court seems to occupy a middle ground between the two extremes, holding that whilst actual participation in the profits as *principals*, in general creates a partnership as between the participant and third persons, the rule has no application where such participant has no power in the firm, and no such interest in the profits as will enable him to go into a court of equity to enforce a lien for the same.

In the absence of any very definite and authoritative ruling of this court the lower courts of the United States have not been uniform in their interpretation and application of the law. Judge Deady, of the 9th (Oregon) circuit, delivered a recent opinion in harmony with the course adopted in the circuit court for the District of West Tennessee.

In re Francis, a bankruptcy case, reported in 2d Sawyer (Or.) 286, this Judge holds that "participation in the profits of a business is presumptive or *prima facie* proof that the participator is a partner in such business, and in the absence of other proof, is sufficient evidence thereof; but such presumption may be overcome by showing that such profits were received by the party simply as wages for services performed *or interest for money loaned to the person carrying on such business.*"

Judge Deady delivers an elaborate opinion reviewing the English cases and denies that the rule as laid down in Waugh vs. Carver is now the law; and there can be no question that the drift of modern legal and judicial opinion is in a direction opposite to that expressed in Waugh vs. Carver and more in harmony with the advanced

interests of commerce and the employment of capital. This will clearly appear as well from reference to the text writers as from the decisions of the courts in particular cases. Among the former may be cited:

Story on Part. 6 Ed. §§ 32 to 49 and note.
Parsons on Part. 70, 71, 88 to 93, 148.
Collyer on Part. 14.
Gow on Part, 17.
Lindley on Part. 40-93 (Marg.)
Bisset on Part. 14.

A great many State cases might be referred to similar to the one at bar, where money had been advanced to a party to forward some business interest, mining, manufacturing, merchandising, etc., in consideration of which a compensation was to be made out of the profits, or a certain portion of the profits, or in a sum by way of interest equal to a certain part of the profits (as in Mr. Davis' case) and the rule to be extracted from the cases may be stated to be that *"the true test is, did the alleged partner, by his agreement, acquire any property in, or control over, or specific lien upon the profits while they remained undivided, in preference to other creditors? If he did, he is liable to third persons; otherwise, not."*

Amongst others the following may be cited as leading State authority:

Dwinel vs. Stone, 30 Maine, 384.
Eastman vs. Clark, 53 N. H., 276.
Denny vs. Cabot, 6 Met. (Mass.) 82.
B. and C. Mining Co. vs. Smith, R. I. (S. L. R.)
Loomis vs. Marshall, 12 Conn., 69.
Burkle vs. Eckart, 1 Denio., 337.
Hart vs. Kelly, 83 Penn. St., 286.
Harvey vs. Childs, 28 Ohio St., 319.
Parker vs. Fergus, 43 Ills. 437.
Campbell vs. Dent, 54 Mo., 325.
Shepard vs. Pratt, 16 Kans., 213.
Ford vs. Smith, 27 Wis., 266.
Chap, Lewis & Co. vs. Conant, 3 W. Va., 50.
Cox vs. Delano, 1 Dev. (N. C.) 90.
Chaffraix vs. Lafitte, 30 La. An. 631.

It would be unnecessary and inappropriate to refer to the cases in detail. Some of them, are, of course, much more fully considered than others and furnish exhaustive discussions of that branch of the law relating to partnerships; and in reference to all of them, together with many other cases, English and American, that might be cited, it may be remarked generally, that they will be found to sustain more or less directly the doctrine as recognized and applied in Tennessee.

The question of usury, which is raised in the pleadings in this cause is considered in some of the cases above cited and held not to apply in the absence of a corrupt agreement intended to evade the law regulating interest. But as only a *judgment* creditor can raise this issue in Tennessee, it is unnecessary to consider it.

Esselman vs. Wells, 8 Hum., 482.
Battle vs. Sheete, 3 Head. 547.

J. W. CLAPP.
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